No. 12,680

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY MARKS and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
Appellees.

PETITION FOR A REHEARING.

J. GARNER ANTHONY,
FRANK D. PADGETT,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Counsel for Appellees and Petitioners.

ROBERTSON, CASTLE & ANTHONY,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Of Counsel.

Subject Index

Table of Authorities Cited

No. 12,680

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

A. LESTER MARKS, ELIZABETH LOY MARKS and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
Appellees.

PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

We respectfully petition this Court for a rehearing upon the following grounds that this Court erred:

(1) In ruling that the loss of appellees' livestock arose out of "combat activities."

(2) In holding that appellees could not recover for the wrongful seizure and occupancy of their leasehold.

ARGUMENT.

(1) THE LOSS OF APPELLEES' CATTLE, PIGS AND HORSES DID NOT ARISE OUT OF COMBAT ACTIVITIES WITHIN THE MEANING OF THAT TERM AS USED IN PRIVATE LAW 433, 80TH CONG., 2d SESS.

A. The legislative history of the act makes it clear that the injuries proved were not within the scope of the exception for injuries arising out of combat activities.

The crux of the court's opinion on this point appears to be contained in the following paragraph:

> During the period involved, as this court early recognized, the situation in the Islands was one of gravest emergency. The troop movements here did not involve long-range defensive operations, nor were they activities remote in time or place from a zone of actual combat. They represented, rather, the instinctive reaction of the military to counter what was felt to be a present threat. The relation between the surprise attack on Pearl Harbor and the deployment of the troops was so immediate and imperative that they can not be regarded otherwise than as part of a single episode of warfare (Opinion p. 5).

As a finding of fact, totally unsupported by the evidence, this will be more fully dealt with later under Point I(B). For the purpose of the present discussion we temporarily pass over its lack of support in the record.

Assuming for the moment that the injuries complained of were a necessary concomitant of the deployment of the troops on the appellees' lands and that that deployment was not part of a "long-range

defensive operation" but was "the instinctive reaction of the military," nevertheless the deployment was a defensive operation in preparation for an anticipated invasion as the record makes clear (R. 141-144, 47-48, 52, 53, 127, 128) and as such was clearly not within the intendment of the phrase "combat activities" in the act (Private Law 433, 80th Cong., 2d Sess.) as the Committee report makes clear (H.R. Rep. No. 2063, 80th Cong., 2d Sess., 1948). In our brief (pp. 6, 7) the two following excerpts from this report were quoted:

> In this connection, it should be pointed out that the Department of the Army have included in section 1 of the bill a proviso clause which would preclude judgment being rendered against the United States for the loss of personal property, including livestock, which arose out of the 'combat activities' of United States military personnel. This proviso seems unnecessary as no evidence was presented to your committee of any combat activities, as the term is generally understood, of military personnel in the areas in question. However, as stated earlier, the United States Army did engage in defensive operations, moving in artillery and military personnel, setting up camps, roads, etc., and these are the activities complained of which the estate contends resulted in the loss of its property. Your committee by adopting the bill in its entirety, including the proviso, does not intend to relieve the United States of any liability for the claimant's loss of personal property, including livestock, due to the activity of the United States forces, and if such

losses are established by competent evidence to be the result of such activities the court is instructed to render judgment therefor (H.R. Rep. No. 2063, p. 4).

* * * *

The claims of the estate of L. L. McCandless, deceased, against the United States arise out of the military operations of the United States' forces in the districts of Waianae and Waialua, island of Oahu, in the Territory of Hawaii, on and after December 7, 1941. On that date, following the bombing of Pearl Harbor, and in defensive operations against possible Japanese invasion, United States Army contingents, including artillery, swarmed over the lands owned in fee simple or under lease by the said McCandless estate. The Army forces knocked down fences, which resulted in the loss of many cattle that were frightened out of the area, some into the forest reserve and not recoverable, and others were killed. The Army's occupation not only impeded but practically destroyed further ranch operations by the estate, and the Army's remaining in possession not only caused the loss or destruction of cattle and other personal property but also effectively deprived the estate of the land itself. No claim was here made for damages with respect to the land owned outright by the claimant, but only with respect to the lands held under lease (H.R. Report No. 2063, p. 2).

Thus we see that defensive operations of the type here proved were expressly stated *not* to be within the intendment of the phrase "combat activities."

This the Court chose to cast aside in a footnote on the ground that the meaning of the phrase is "too plain to permit a resort to extraneous evidence of the legislative intent." While it is true that plain words in a statute cannot be overcome by legislative history (*Ex Parte Collett,* 337 U.S. 55), where there is ambiguity the legislative interpretation at the time of enactment will be followed (*Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* 336 U.S. 301).

The statement in the footnote that the phrase is so plain of meaning that no resort to legislative intent is possible is unsupportable. The phrase "combat activities" is so patently ambiguous that extended argument does not seem necessary. Every decision turning on whether an act was a combat activity must necessarily turn on mixed questions of law and fact and be one of degree. If any support (outside of common experience) were necessary for the view that the term "combat activities" is not plain but is ambiguous the following excerpt from the testimony of appellant's military expert should suffice:

> The Witness: Yes, I have the question. It is very difficult even for a military man to define combat, but in a general sense everything that took place on this island shortly after the attack on December 7 involved combat. We construe our overseas tours of duty, for instance—if we are in a combat zone, although there might not be a shot fired, we get credit for combat service. So I would say that it certainly approaches a combat

situation although categorically it is a difficult question to answer (R. 144-5).

To this we might add that the fact there are three reported cases (*Jefferson v. United States,* 74 F. Supp. 209 (1947); *Johnson v. United States,* 170 F. 2d 767 (CA 9, 1948); *Skeels v. United States,* 72 Supp. 372 (1947)) dealing with the construction of the similar phrase "combatant activities" in the Federal Tort Claims Act (28 U.S.C. 2680(j)) is not without significance.

This Court erred in holding that "combat activities" was so plain of meaning as to preclude resort to legislative history and thus misconstrued the statute, depriving appellees of the compensation justly due them for the wrongs committed.

B. This Court erred in ignoring the findings of fact of the court below and in making contradictory findings unsupported by the evidence.

Findings 4 and 5 of the court below are as follows:

> 4. That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs' premises were not engaged in combat activities.

5. That as a direct result of the activities of the military personnel on the premises, fences, paddocks and corrals were destroyed and caused livestock of plaintiffs to be dispersed throughout the countryside which resulted in damage to the plaintiffs as follows:

(a)	287 head of cattle lost	$12,915.00
(b)	Cost to plaintiffs of recovering stray cattle	2,079.00
(c)	200 pigs	3,000.00
(d)	2 horses	250.00
(e)	Loss of 500 bags, 400 bags of algaroba beans and 200 redwood posts	190.00
(f)	Value of General Leases 1740 and 1741 for 4⅓ years	41,460.29
(g)	Rental value of house and guest cottage	6,000.00
	Total	$65,894.29

(R. 15-16)

This Court in its opinion states that "the military activities on the ranch were confined to the erection of barbed wire entanglement and to the guarding and patrolling of the beach" (p. 4). Assuming this to be correct it is difficult to see how the dispersal of the cattle made possible by the cutting of the fences but caused by the cutting of the water pipes and destruction of the water troughs (R. 50-51, 48) or the dispersal of the pigs involving their shooting by the troops (R. 52-53) or the death of the horses resulting from the cutting of the fence (R. 52) or the leaving open of a gate (R. 128) can be said to be the result of

"combat activities" even if the military activities described by this Court can be said to have been such. The cutting of pipes, the destruction of water troughs, the shooting of animals, and the leaving open of gates are not military activities. Even the cutting of the fences need not have resulted in the loss of appellees' livestock for the exigencies were not such as to prevent the erection of temporary barriers where fences were necessarily cut (Ex. B).

The Court's earlier findings (Opinion, p. 5) that "the troop movements here did not involve long-range defensive operations" but that they represented the "instinctive reaction of the military to a present threat" and that the deployment of the troops was so closely connected with the Pearl Harbor attack that they must be regarded as "a single episode of warfare" are totally unsupported by the record. Moreover these observations appear to reflect upon the professional competence of the military command. Where is the testimony which supports the finding that this deployment was not part of a long-range defensive operation? Where is the testimony which says this deployment was an "instinctive reaction?" Surely our defenses do not rest on instinctive reactions. Where is the testimony that says this deployment on appellees' lands and the Pearl Harbor attack were so closely related as to be part of a "single episode of warfare?" The testimony of Colonel Fielder, the only professional military man to testify is offered on the question of the soundness of these findings:

Q. And were you familiar with the general activities on Oahu during that period, particularly, as they affected the military situation?

A. Yes, I was. I was probably more familiar with it than any other officer, because that was part of my duties.

Q. Will you tell us what the activities were?

A. Well, the military activities after the attack on December 7 consisted primarily of the preparation for possible invasion, although the top military people—they didn't know whether the Japanese would attempt to land or not. The ground forces defending this island, in particular, had to be prepared. Consequently, most of the time was spent in stringing barbed wire and in placing artillery pieces, machine guns, mortars, 37 mm. guns, and light weapons and equipment for the defense of the beaches in the event of a landing of the Japanese.

Q. What was the general anticipation, particularly in so far as the military was concerned, with regard to possible invasion?

A. They thought it was possible that raids might be attempted by the Japanese, to say the least. An all-out invasion to capture the islands seemed not too probable, but possible. After all, the Military didn't think that the Japs would attack the place in the first place, so they felt that there was always a threat of an attempted invasion.

Q. Was there a general anticipation of some attack or invasion?

A. There was definitely anticipation of raids, agents being landed from submarines, air tights, and the like.

(R. 140-141)

We submit that as a matter of fact as well as of law the military activities out of which the injuries complained of arose were not combat activities.

---

(2) THIS COURT ERRED IN HOLDING THAT THE APPELLEES CANNOT RECOVER FOR THE WRONGFUL SEIZURE AND OCCUPANCY BY THE GOVERNMENT OF THEIR VESTED LEASEHOLD.

A. This Court held that public lands leased by the territory might be withdrawn from the leases without compensation regardless of the terms of the leases.

(1) To reach this result the Court misconstrued Section 91 of the Hawaiian Organic Act.

Section 91 of the Hawaiian Organic Act provides in part:

> Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation, approved July 7, 1898, (30 Stat. 750) shall remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii * * *.

The Court in its opinion (p. 9) construed this section as giving the United States the power to take possession of leased public lands without paying any compensation to the lessee regardless of the terms of the lease. It is apparent even on a cursory reading

that such a construction is without merit. The clause quoted states that except as otherwise provided ceded public lands are to remain in the possession of the territory until other disposition is made by Congress or until taken for the purposes of the United States. No one disputes that the Territory of Hawaii under Section 73 of the Organic Act had the power to lease these lands and surely it cannot be doubted that after lands are leased to others they are no longer "in the possession" of the territory. The clause in question makes it apparent that the lands subject to being set aside for the purposes of the United States are lands in the possession of the territory and that lands under lease cannot be so set aside. The lands here in question were lands not retained in the possession of the territory because they were otherwise provided for by the power to lease conferred on the Commissioner of Public Lands under Section 73 and by the exercising of that power by the granting of General Leases 1740 and 1741.

If the Court's construction of Section 91 is correct, then that section is in direct conflict with Section 73(d) of the Organic Act which provides that leases of "lands suitable for the cultivation of sugar cane" unlike leases of other agricultural lands can be made without a clause allowing withdrawal for homestead or public purposes in which event it is expressly stated that "land so leased shall not be subject to withdrawal."

(2) This Court erred in holding that the government might destroy vested interests in land at will without paying compensation.

In our brief (p. 12) we pointed out that when the sovereign enters a contract it is bound the same as a private party, *Hall v. Wisconsin*, 103 U.S. 5, 11 (1880) and that this principle applied to leases, *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 79 N.E. 827 (1907) as well as to other grants. *Town of Pawlet v. Clark*, 9 Cranch 292, 329 (1815), *Terret v. Taylor,* 9 Cranch 43 (1815). This Court in a footnote (n. 13, p. 9), to its opinion concedes that this may be true as to sale of the fee, but it is not true as to leases because leased land remains public land. This conflicts with Section 73(h) which provides that on forfeiture of a homestead lease the leased lands *resume* their status as public lands.

Furthermore, the attempted distinction ignores the fact that leaseholds for a term have been recognized by the law as vested interests entitled to equal protection with freehold interests for nearly five hundred years.

If such interests are subject to destruction at will, then the territorial leases of sugar lands under Section 73(d) of the Organic Act, of right of purchase leases under Section 73(f) or of homestead leases under Section 207 of the Hawaiian Homes Commission Act 1920, 48 U.S.C. 701 have become mere tenancies at will and the whole attempt of Congress by Section 73 of the Hawaiian Organic Act to set up an orderly administration of public lands of Hawaii so

that they might be leased, utilized and developed by the people is frustrated.

Congress delegated to the Commissioner of Public Lands by Section 73 of the Organic Act the power to lease public lands. The sovereign cannot, under the law, destroy the interests created by such leases without compensation unless the leases themselves so provide, for when the sovereign enters a contract it descends to the level of a private individual and stands equally before the law as any contracting party.

(3) This Court erred in misconstruing United States v. Chun Chin, 150 F. 2d 1016.

This Court, to support its construction of Section 91 (permitting the destruction at will and without compensation of leasehold interests in public lands of the territory regardless of the terms of the leases involved) cites *United States v. Chun Chin*, 150 F. 2d 1016 and baldly states that that case so held. If so, the significance of the case escaped counsel in the present case (it was not even cited by either side) and certainly a study of the opinion reveals no such holding. It will be recalled that when the *Chun Chin* case was referred to at argument by the court, government counsel agreed that it had nothing to do with the issues here. If that case holds what this Court says it does, it is simply wrong, but we submit that its only holding is that a condenmnation proceeding was not an appropriate action in which to assert the lessee's claim for damages. This is what the opinion

says, and that is the only significance of the citation of *United States v. North American Co.*, 253 U.S. 330.

The answer to the procedural holding of the *Chun Chin* case, is that this *is* an appropriate proceeding in which to enforce appellees' claim inasmuch as it is a suit on a private act and not a condemnation proceeding.

B. This Court erred in construing General Leases Nos. 1740 and 1741 as permitting a withdrawal of the lands demised for the public purposes of the United States.

Leases Nos. 1740 and 1741 contain the following proviso:

> It Is Mutually Agreed, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operations of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of this lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn (R. 35, 36).

This Court construed the phrase "any public purpose" as being broad enough to include public purposes of the United States. As we pointed out in our brief, this language was construed in *Ai v. Bailey*, 30 Haw. 210 (1927) to be governed by the canon of construction *noscitur a sociis*. Since the specific public purposes set forth are obviously territorial purposes, the phrase "any public purpose" obviously means any *territorial* public purpose, not any public purpose of the United States.

Any other construction of the withdrawal covenant would render the language of the covenant "and possession resumed by the Lessor" (i.e., the Commissioner of Public Lands) meaningless.

C. This Court erred in holding that there had been a prior construction of the lease binding on appellees.

Appellant introduced in evidence a letter (Ex. 3; R. 173) from the Commissioner of Public Lands dated January 16, 1929, withdrawing 8.84 acres by executive order from Lease No. 1740. Nothing by way of explanation or elucidation with reference to this letter was put in evidence by either side. This Court seized upon the letter as a construction of "public purposes" by the parties binding upon the appellees.

At the time of the seizure Leases Nos. 1740 and 1741 comprised 4792.72 acres which were valued by the Court as being worth $2 per acre per annum to appellees. Assuming the value per acre in 1929 had risen to the value found in 1941, the loss involved in

the withdrawal would have been $318 for the 18 years of the leases which figure reduced to present worth would have amounted to something under $150. Assuming the value in 1929 was the same as 1926, the damage was zero. In any event it was too inconsequential to warrant a contest. Moreover the withdrawal of 8.84 acres would hardly affect the operations of a ranch of this size. To say that the lessee by acquiescing in the withdrawal of 8.84 acres waived his right to resist confiscation of the whole leasehold of 4792.72 acres is to reduce a rule of construction to an absurdity.

CONCLUSION.

This Court has construed two acts of Congress in a manner which utterly defeats the legislative will. The construction of Private Law 433 adopted by this Court in effect says that the Congress was doing an idle act when it passed the jurisdictional bill to permit suit and never really intended appellees to have any relief for the damage done. This error affects only the appellees.

The other and more serious error (the misinterpretation of the Hawaiian Organic Act) contrary to the settled administrative construction since the very beginning of a territorial government in Hawaii, affects the entire system of public lands of Hawaii. In one stroke this Court has unwittingly rendered all leases of public lands subject to a hitherto unsuspected congenital defect—the exposure to the risk that at any

time the federal government could confiscate leaseholds with valuable improvements placed on the land without compensation to the owner. This would be a denial of due process of law under the Fifth Amendment.

We submit that the Court should grant a rehearing and affirm the judgment below.

Dated, Honolulu, Hawaii,
May 2, 1951.

Respectfully submitted,
J. GARNER ANTHONY,
FRANK D. PADGETT,
Counsel for Appellees and Petitioners.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Certificate

I hereby certify that the foregoing petition in my judgment is well founded and that it is not interposed for purposes of delay.

Dated, Honolulu, Hawaii,
May 2, 1951.

J. Garner Anthony,
Of Counsel for Appellees and Petitioners.